

UT 95-5

Tax Type: USE TAX

Issue: Use Tax On Purchases, Fixed Assets or Consumables

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
SPRINGFIELD, ILLINOIS

THE DEPARTMENT OF REVENUE)
OF THE STATE OF ILLINOIS)
)
v.) Docket #
)
XXXXXX) IBT #
)
Taxpayer)

RECOMMENDATION FOR DISPOSITION

APPEARANCES XXXXX for XXXXX

SYNOPSIS This matter comes on for hearing pursuant to XXXXX (hereinafter "taxpayer") timely protest of Notice of Tax Liability No. XXXXX issued by the Illinois Department of Revenue (hereinafter "Department") on December 30, 1992. At issue are the questions: 1) Whether the purchase of fire extinguishers qualify for the "rolling stock" exemption as provided under the terms of 35 ILCS 120/3-60; 2) Whether the taxpayer owes Use Tax on de-icer fluid; and 3) Whether food purchased from a retailer and given away is subject to Use Tax. Following the submission of all evidence and a review of the record, it is recommended that all matters be resolved in favor of the Department.

FINDINGS OF FACT

1. The Department's prima facie case, inclusive of all jurisdictional elements, was established by the admission into evidence of the Correction of Returns. (Dept. Ex. No. 6).

2. The taxpayer operates trucks on an interstate basis for hire.

3. The taxpayer purchased fire extinguishers for each of its trucks due to its understanding that federal safety regulations required these for

the subject carriers. The taxpayer did not pay tax on the extinguisher, believing them exempt under the state's "rolling stock" exemption. (Tr. at p. 31).

4. The taxpayer purchased turkeys and hams from a retailer to give away at Christmas. The taxpayer had no records at the time of audit, or for admission at hearing, to prove tax was paid on the food purchases. (Tr. at pp. 13, 33).

5. The taxpayer purchased an anti-gelling device to keep the fuel from freezing. When the additive is added to the diesel it keeps the fuel from freezing. It paid tax on the additive and the auditor disallowed the entire tax deduction it had taken on Illinois mileage use.

CONCLUSIONS OF LAW On examination of the record established, this taxpayer has failed to demonstrate by the presentation of testimony or through exhibits or argument evidence sufficient to overcome the Department's prima facie case of tax liability for the fire extinguisher, food acquisitions and de-icer-fluid under the assessment in question. Accordingly, by such failure, and under the reasoning given below, the determination by the Department that XXXXX owes Use Tax must stand as a matter of law. In support thereof, the following conclusions are made:

Administrative Notice is taken of Federal Motor Carrier Safety Regulations as prescribed by the U.S. Department of Transportation Federal Highway Administration at part 393.95, which states that a driveaway-towaway must be equipped with a fire extinguisher. (taxpayer Ex. No. 3).

The issue of the taxability of the fire extinguishers is a matter of state law and the administrative regulations promulgated under the "rolling stock" exemption of the Illinois Retailers' Occupation Tax Act do not exempt the fire extinguishers from Illinois tax. Specifically "[t]he exemption does not apply to fuel nor to jacks or flares or other items... that do not become a part of such vehicles, and that do not participate

directly in some way in the transportation process." (86 Ill. Adm. Code 130.340 (b)).

The Department letter rulings have interpreted the rolling stock exemption to include anti-freeze additives. (See Sunshine Letter Rulings 92-0122 issued March 2, 1992; and 94-0602 issued December 27, 1994). De-icer fluid, however, is a consumable, not within the purview of the exemption.

The Retailers' Occupation Tax Act, (35 ILCS 120/1) provides the following:

"As soon as practical after any return is filed, the Department shall examine such return and shall if necessary correct such return according to its best judgment and information, which return so corrected by the Department shall be prima facie correct and shall be prima facie evidence of the correctness of the amount of tax due as shown herein."

The statute has been strictly construed insofar as establishing a prima facie case is concerned, and the Illinois Courts have universally sustained a prima facie case based upon the corrected tax return. *Fillichio v. Department of Revenue*, 15 Ill.2nd 327 (1985).

The taxpayer has failed to produce records showing tax was paid on the turkeys and hams. Furthermore, gifts are taxable to the purchaser as it is the purchaser who exercises dominion and control over the personalty when it makes use of the item by being the donee of a gift.

In conclusion, it is recommended that assessment No. XXXXX be finalized in its entirety.

RECOMMENDATION It is my recommendation that Notice of Tax Liability No. XXXXX be finalized as memorialized above.

William J. Hogan
Administrative Law Judge